



February 15, 2000

Mr. Jim Kozlowski
Texas Growth Fund
111 Congress Avenue, Suite 2900
Austin, Texas 78701

OR2000-0540

Dear Mr. Kozlowski:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 132384.

The Texas Growth Fund ("TGF") received four related requests from the same requestor, all asking for information pertaining to the two trusts which the TGF oversees. You state that the TGF has released all responsive information in regard to three of the four requests. The remaining request seeks:

all information relating to any updates, corrections, audits, correspondence, communications, etc. concerning the following publicly-reported Texas Growth Fund IRRs as of 8/31/99 and the status of each on a) 12/31/97 [and]
b) 12/31/98:

- 1) 1991 Trust: 10.6%
- 2) 1995 Trust: -1.8%

You explain that there are no publicly-reported Texas Growth Fund IRRs as of 8/31/99. Moreover, you state that no IRR was calculated for December 31, 1997. Finally, you explain that while the requestor's cited internal rates of return (10.6% and -1.8%) are incorrect, nevertheless, you have construed the request liberally to encompass the status of the 1991 trust and the 1995 trust as of December 31, 1998. The information that is responsive to this request consists of briefing materials regarding the portfolio of the TGF and valuations of private companies in which the TGF invests. You claim that this requested information is excepted from disclosure under sections 552.104 and 552.110 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Section 552.104 of the Government Code protects from required public disclosure “information that, if released, would give advantage to a competitor or bidder.” The purpose of section 552.104 is to protect the government’s interests when it is involved in certain commercial transactions. For example, section 552.104 is generally invoked to except information submitted to a governmental body as part of a bid or similar proposal. *See, e.g.*, Open Records Decision No. 463 (1987). In these situations, the exception protects the government’s interests in obtaining the most favorable proposal terms possible by denying access to proposals prior to the award of a contract. When a governmental body seeks protection as a competitor, however, we have stated that it must be afforded the right to claim the “competitive advantage” aspect of section 552.104 if it meets two criteria. The governmental body must first demonstrate that it has specific marketplace interests. Open Records Decision No. 593 at 4 (1991). Second, a governmental body must demonstrate actual or potential harm to its interests in a particular competitive situation. A general allegation of a remote possibility of harm is not sufficient to invoke section 552.104. *Id.* at 2. Whether release of particular information would harm the legitimate marketplace interests of a governmental body requires a showing of the possibility of some specific harm in a particular competitive situation. *Id.* at 5, 10.

You explain that the two trusts to which the requestor refers constitute the funds of the TGF. You state that the TGF invests its funds entirely within the private equity marketplace. You also state that the submitted material is a compilation of both the information the private investment portfolio managers obtain from potential investment vehicles and their opinions and analyses of the vehicles. You argue:

The TGF competes in the private equity marketplace, which requires complete confidentiality to achieve success. . . . The disclosure of the detailed financial and other information in the . . . [submitted information] would completely eliminate the competitive position of the TGF. The whole point of investing in the private equity marketplace is to capitalize on certain Private Companies.¹ If this knowledge were provided to the entire marketplace, the private investment vehicles would lose their “private” nature and all the information that was so diligently and carefully assimilated would be available to any other investor, thus destroying any competitive advantage. The compelled release of such confidential information by the TGF would seriously harm the ability of the TGF to compete for high quality private investments.

¹You use the term “Private Companies” to mean “the private companies that comprise the private equity marketplace.”

Based on your arguments and our review of the submitted records, we find that you have demonstrated that TGF has specific marketplace interests, and therefore, we believe that TGF may be considered a “competitor” for purposes of section 552.104. *See* Open Records Decision No. 593 (1987). Furthermore, we conclude that you have shown that release of the submitted documents will bring about a specific harm to TGF’s marketplace interest. Accordingly, TGF may withhold the submitted information under section 552.104.²

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov’t Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

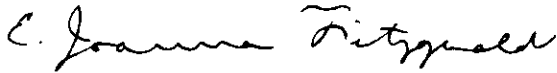
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body’s intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general’s Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

²Because we are able to make a determination under section 552.104, we do not address the additional arguments regarding section 552.110.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in cursive script that reads "E. Joanna Fitzgerald".

E. Joanna Fitzgerald
Assistant Attorney General
Open Records Division

EJF/nc

Ref: ID# 132384

Encl. Submitted documents

cc: Mr. Steven N. Lisson
Initiate!!
P.O. Box 2013
Austin, Texas 78768
(w/o enclosures)